

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6242

APPEAL OF KATHERINE K. LIEBERMAN

OPINION OF THE BOARD

(Hearings held May 7, 2008 and September 24, 2008)
(Effective Date of Opinion: January 15, 2009)

Case No. A-6242 is an administrative appeal filed by Katherine K. Lieberman (the "Appellant") from the November 29, 2007 decision of the Historic Preservation Commission (the "HPC" or the "Commission") to deny Historic Area Work Permit ("HAWP") No. 463823 for work already done or proposed to be done on the property located at 315 Ashton Road, Ashton, Maryland 20861 (the "Property").¹

Pursuant to Sections 24A-7(h), 2-112, and 2A-1 et seq. of the Montgomery County Code, the Board held public hearings on the appeal on May 7, 2008, and September 24, 2008. The Appellant appeared pro se. Associate County Attorney Malcolm Spicer represented the HPC.

Decision of the Board: Administrative appeal **DENIED**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 315 Ashton Road and "Tanglewood," is individually designated on the Master Plan for Historic Preservation in Montgomery County (Master Plan Site #15/37). The Property is noted as being in the Gothic Revival style, and as dating to 1871. The HPC staff reports include the following description:

The house is a 2½ story, four-bay dwelling with a cross-gabled roof, sheathed with a standing seam metal roof. An original single story porch is located on the

¹ Appellant's charging document indicates that her appeal is taken from the November 14, 2007 decision of the HPC. This was the date on which the HPC voted to deny Historic Area Work Permit No. 463823. The HPC's written decision reflecting its November 14th denial was issued on November 29, 2007.

front of the house. Much of the original house remains intact. A later period two-story addition has been built over the enclosed side porch.

The house is sited on a large lot and contains a number of mature trees and vegetation. The property also contains a collection of outbuildings including a brick smokehouse, Gothic Revival corncrib, board and batten work shed.

The staff reports further note that a Montgomery County publication, *Places from the Past: The Tradition of Gardez Bien in Montgomery County, Maryland*, which inventories historic sites and districts in Montgomery County, includes the following information regarding the historical context of this Property:

The attractive and spacious residence known as Tanglewood was the home of community leader Alban Gilpin Thomas and hostess Susannah Leggett Thomas. At the time of their marriage, in 1871, the Thomases built the house and continued to expand and improve it over several decades. A storekeeper in Ashton since the 1960s, Alban became the community's first postmaster in 1884, opening a section of this store to accommodate the post office, as was the custom. He was president of the Sandy Spring Bank, and organized Citizens National Bank in Laurel. After 1928, Frederick Thomas lived at Tanglewood with his family and succeeded his father Alban as bank president. A striking aspect of the Tanglewood property is its outstanding collection of outbuildings, including a brick smokehouse, Gothic Revival corncrib, board and batten work shed. On the main house, a second story addition was building in 1987 over an enclosed side porch. Ownership by the Thomas family descendants has continued into the 21st century.

See Exhibits 6(c) (11/7/07 staff report) and 6(d) (9/19/07 staff report).

2. The Historic Preservation Office received Appellant's application for HAWP No. 463823 on August 23, 2007.² See Exhibit 6(a). The Appellant sought permission from the HPC to make the following alterations to the Property:
 1. Removal and reconstruction of the front porch.
 2. Installation 125' gravel driveway along the front of the house.
 3. Removal of one mature tree on the southwest corner of the main house.
 4. Reconstruction of the existing stone patio and retaining wall adjacent to the south side of the house. The reconstructed patio will add 5' in width to the existing patio, and utilize brick for the surface.

² The HAWP application was dated June 5, 2007, and, per the testimony of the Appellant, was originally submitted to the Maryland Environmental Trust ("MET"), which holds a conservation easement on the subject Property, under the mistaken assumption that the MET would forward the application to the HPC.

5. Removal of 43' of a non-historic stone wall located on the south side of the property. The stone will be reused for the proposed patio and retaining wall construction adjacent to the home.
6. Removal of a 130' section of the existing gravel driveway along the south side of the house.
7. Removal of the existing pool at the rear of the property.

On September 19, 2007, HPC staff issued a written report indicating that a number of the proposed alterations had already been completed or were in progress, and thus that retroactive permission was in fact being sought for these changes. See Exhibit 6(d).³ The staff report went on to recommend approval of the application for HAWP No. 463823 with the following four conditions:

1. The design of the front porch will match the original style and form of the porch per historic photo.
2. The applicant will provide staff with construction level drawings for the proposed front porch reconstruction. (Plans will be submitted to staff prior to stamping permit set of drawings.)
3. Explore a design alternative that would eliminate the installation of the front driveway and create a small gravel turnaround in the existing driveway location.
4. The applicant will meet any conditions set forth by the Maryland Environmental Trust.

See Exhibit 6(d). The HPC considered Appellant's HAWP application at a public hearing held on September 26, 2007, and agreed at that time to continue the matter so that Appellant could submit more detailed drawings regarding the reconstruction of the front porch and could work with staff regarding options for the driveway. See Exhibit 6(e).

3. On November 7, 2007, HPC staff issued a second written report regarding Appellant's HAWP application. This second report also recommended approval, with the following revised conditions:

³ Specifically, the September 19th staff report indicates that the following alterations had already been completed or were in progress:

1. Removal of the original front porch and two non-historic wings.
2. Removal of large tree adjacent to the main house.
3. Removal of non-historic stone wall.
4. Reconstruction and widening of existing stone patio.
5. Minor site grading for proposed 125' gravel driveway reorientation.

The report goes on to categorize removal of the existing 130' gravel driveway along the south side of the house, installation of a 125' gravel driveway along the front of the house, and removal of the swimming pool as "proposed" alterations. That notwithstanding, Appellant testified at the September 27, 2007 hearing before the HPC that the driveway "was already in." See Exhibit 6(e) at circle 52.

1. The applicant will work with staff to ensure all pertinent design features of the original front porch are included on the final plans prior to submitting permit set of drawings for review and stamping by HPC staff.
2. All trim and molding on the reconstructed front porch will be fabricated of painted wood.
3. The applicant will meet any conditions as set forth by the Maryland Environmental Trust.

The November staff report noted that when the HPC reviewed this application in September, the Commission generally had no concerns with alterations 3 through 7, as set forth in paragraph 2, above, but had great concern with the fact that much of the work had already been completed, and with the lack of information concerning the proposed front porch reconstruction, and the inaccuracies of the site plan for the proposed/in progress driveway installation. The report notes that the applicant had since provided drawings for the proposed front porch reconstruction, photos of the porch before it was removed, and a more accurate site plan for the completed driveway installation. See Exhibit 6(c).

4. On November 14, 2007, the HPC held a public hearing to continue its consideration of this HAWP. Appellant was not present at that proceeding. At that time, the Commission voted unanimously to deny the requested HAWP, saying, among other things, that:

“there is no real support for approving the removal and reconstruction of the front porch without additional drawings ... there is more of a split decision over the driveway, but the Commission was generally leaning toward the negative, and that all other items of the proposal could be approved.”

The HPC, guided by Chapter 24A of the County Code and the *Secretary of the Interior's Standards for Rehabilitation*, 36 C.F.R. 67, specifically Standards #6, #9, and #10, issued a -Decision and Opinion denying this HAWP on November 29, 2007, with the following findings:

1. 315 Ashton Road is an Individually Designated *Master Plan* Site #15/37 (**Tanglewood**).
2. The proposal for removal and reconstruction of the front porch, installation of 125' of gravel driveway along the front of the house, removal of a 130' section of the existing gravel driveway along the south side of the house, removal of one mature tree on the southwest corner of the main house, reconstruction of the existing stone patio and retaining wall adjacent to the south side of the property, and removal of an existing stone wall and pool at the rear of the property is not in keeping with the *Secretary of the Interior's Standards for Rehabilitation* and constitutes changes to the Individually Designated *Master*

Plan Site and its environmental setting that adversely affect the historic resource.

See Exhibit 6(a).

5. The Appellant timely filed this appeal of the HPC's written Decision and Opinion to the Board of Appeals on December 13, 2007. Counsel for the County indicated at the September 24th hearing that the only aspect of this HAWP denial that remains unresolved is the installation of the 125 foot gravel driveway across the front of the house. The other matters were addressed to the satisfaction of the HPC, as indicated by their February 13, 2008 grant of a separate HAWP.
6. Mr. Scott Whipple, Historic Preservation Supervisor with the Montgomery County Planning Department, testified for the County. Mr. Whipple stated that he is responsible for the oversight of HAWPs. He testified that the work proposed by the Appellant required a HAWP because it was an exterior alteration to a historic site. He testified that because some of the work proposed in Appellant's HAWP application had already been completed prior to review of the HAWP, the HAWP was considered retroactively. He testified that when the HPC considers a HAWP retroactively, they consider it as if the work had not been done.

Mr. Whipple testified that the Property is an historic resource individually listed as Master Plan Site 15/37, and was included on the Approved and Adopted Sandy Spring/Ashton Master Plan. See Exhibit 14. He testified that it was an excellent example of a vernacular Gothic Revival house, and that it had significant outbuildings, including a smokehouse, corn crib, and wood shed. He testified that the environmental setting of this Property was also significant, as recognized in the area Master Plan. He read an excerpt from the area Master Plan, which specifically discusses maintenance of the existing driveway, into the record.⁴ He testified that the driveway is essential to the environmental setting of this Property because it shows how the Property worked and how the outbuildings were accessed. He testified that the circulation pattern created by the driveway was integral to the history of this resource.

Mr. Whipple testified that the work proposed in this HAWP involved removing a section of driveway to the south of the house, and installing a new driveway in front of the house (west side), which would connect the existing driveways on the north and south sides of the house. He testified that adding a driveway across the front of the house would change the appearance of the driveway and would alter the historic circulation pattern and use of the Property. He testified that the historic circulation pattern on this Property was typical of how these types of properties were used, with carriages (and cars) being directed to the rear/service area of the home, where they belonged. He further testified that the house is already accessible by car,⁵ and that the introduction of

⁴ In discussing the Tanglewood site, the Master Plan states that "[i]n the event of development, the refined setting should maintain the existing driveway, mature trees surrounding the house, and the Victorian outbuildings." See Exhibit 14.

⁵ Mr. Whipple testified that there is an entrance on the south side of the house, through a porch, and an entrance in the rear of the house. He testified that no allowing this front driveway would not prevent reasonable use of this

a driveway at the front of the house would alter the environmental setting and change the way in which this Property was understood. He testified that houses of this era in this setting would not have had a front drive. He testified that the front of this home is its primary elevation, and that the relatively open and uninterrupted front yard is an essential part of the environmental setting of this Property, helping to define that setting.

Mr. Whipple testified that there are historic homes, such as formal Georgian-style houses, that would have had a front drive approach, but that this is not that type of house. He testified that this house had a more functional driveway that was not a purposeful part of the landscaping. He stated that houses like the resource in question tried to put service elements to the rear of the home, and that the introduction of parked cars in front of this house would interrupt the viewshed both to and from this historic home.

Mr. Whipple testified that Section 24A.01.01.1.5 of the Code of Montgomery County Regulations provides that in reviewing a HAWP, the HPC shall be guided by Section 24A-8 of the County Code, the *Secretary of the Interior's Standards and Guidelines for Rehabilitation*, and any pertinent guidance in applicable Master Plans, in that order.⁶ He testified that because this was an individually designated site, the HPC relies in particular on the *Secretary's Standards*. He testified that the County Code gives the HPC the authority to consider changes to the environmental setting of an historic property when considering a HAWP. He testified that the *Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings* also emphasize consideration of the environmental setting, and he read sections from that publication which support that conclusion.⁷ See Exhibit 12 at pages 68 and 74.

Mr. Whipple testified that in the instant case, the HPC found that the installation of the new driveway was inconsistent with the standards set forth in Section 24A-8 of the County Code for the issuance of a HAWP. He testified that the installation of a new driveway was inconsistent with *Secretary's Standard #9*, as explained in the guidance

Property.

⁶ He testified that that section also refers to studies specific to a given historic district, but that because this Property was individually designated, district studies were not applicable.

⁷ Mr. Whipple read from the *Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings*, which states, at page 68, that “[t]he landscape surrounding a historic building and contained within an individual parcel of land is considered the building site. The site, including its associated features, contributes to the overall character of the historic property. As a result, the relationship between the buildings and landscape features within the site’s boundaries should be considered in the overall planning for rehabilitation project work.” Page 74 of that publication, which was also read into the record by Mr. Whipple, lists the following activities as “Not Recommended”:

Locating any new construction on the building where important landscape features will be damaged or destroyed, for example removing a lawn and walkway and installing a parking lot.

Placing parking facilities directly adjacent to historic buildings where automobiles may cause damage to the buildings or to important landscape features.

Introducing new construction onto the building site which is visually incompatible in terms of size, scale, design, materials, color, and texture; which destroys historic relationships on the site; or which damages and destroys important landscape features.”

Mr. Whipple explained that the activities relate to *Secretary's Standard #9*.

set forth in the sections he quoted, above. In response to a question from the Board, he testified that the *Secretary of the Interior's Standards & Illustrated Guidelines for Rehabilitating Historic Buildings* are the "how to" manual for implementing projects so that they are in conformance with the *Secretary's Standards*.

Mr. Whipple testified that HAWP applicants are encouraged to work with the HPC staff before submitting their applications. He testified that applicants can have a preliminary consultation with the HPC to get guidance regarding their proposed work before submitting their applications. Mr. Whipple testified that while there was no preliminary consultation with respect to the HAWP at issue, there was lots of email traffic outlining the requirements for the work. In addition, Mr. Whipple testified that staff had visited the Property more than once, and had indicated that a HAWP was necessary.⁸

Mr. Whipple testified that on September 7, 2007, HPC staffer Joshua Silver had visited the subject Property. He testified that at that time, work on the driveway had been started, and the Appellant had been advised that a HAWP was needed. He testified that Mr. Silver took the photographs in the record at Exhibit 6(f)(D)-(H). Mr. Whipple explained that Exhibit 6(f)(D) shows the west/front elevation of this Property. He testified that that photo shows that the beginning of the new driveway was already in place, and that the front porch had already been demolished. He explained that the car on the left side of the photo is on the existing north driveway. Mr. Whipple explained that Exhibit 6(f)(E) depicts the south elevation of the Property, and shows the work on the stone wall and patio. He testified that the historic south driveway would have been there, and that there are at least two entrances to the home on that side. Mr. Whipple testified that Exhibit 6(f)(F) depicted the existing gravel driveway on the southern side. Mr. Whipple testified that Exhibit 6(f)(G) shows where the southern driveway had been, along with some of the outbuildings and the garage.⁹ He explained that Exhibit 6(f)(H) depicted the garage and the southeast elevation of the house.

Mr. Whipple testified that the HPC first considered this HAWP application on September 26, 2007. At that time, Mr. Whipple testified that the HPC concluded that the application was incomplete, that they needed measured drawings for the front porch and better site plan drawings for the driveway. The hearing was continued so that the applicant could come back with a complete application package. Mr. Whipple testified that following that hearing, the applicant worked with HPC staff, but that she did not appear at the subsequent November 14th hearing, and the HAWP was denied. With respect to the driveway, Mr. Whipple testified that the HPC determined that it was not consistent with Section 24A of the County Code, and was not consistent with the *Secretary's Standards*. He testified that the HPC considered the installation of the new driveway an intrusion into the vistas of the environmental setting that had an adverse effect on the views both in and out of this Property, that they considered it inappropriate new construction that had an adverse effect on the environmental setting (particularly the

⁸ Counsel for the County later indicated that she had emails which confirm that an HPC staff member and an MET staffer both visited the Property in March, 2007, and thus that the Appellant was aware of the two different processes, and what was required.

⁹ On cross-examination, when asked if this driveway appeared to be substantial and permanent, Mr. Whipple testified that it appeared to be the remnants of an old, 2-track, gravel driveway that was starting to be overgrown with grass.

views in and out), and that they thus denied the HAWP. When asked on cross-examination how the new driveway was considered an intrusion, Mr. Whipple testified that the introduction of a new feature into the historic landscape puts new construction in a place it hadn't been. He testified that it has an adverse effect on the openness of the front yard, that it interrupts the viewshed in and out of the Property (which he said would be further compromised by the parking of cars in front of the house in a place that cars were never intended to be), and that it changes the historic circulation pattern of this Property. He concluded by saying that the HPC had determined that a gravel driveway was not appropriate for this site.

Mr. Whipple testified that the Maryland Environmental Trust ("MET") has an easement on this Property. He testified that the effect of that easement is that the MET has to review any proposed work for consistency with the terms of the easement. He testified that this is unrelated to and independent of the HAWP review undertaken by the HPC, and that he does not know what standards the MET uses.

When asked on cross-examination if he knew what alternatives to the construction of the front driveway the applicant had been given by the HPC, Mr. Whipple testified that the staff report references some, and that the HPC suggestions included the installation of a walkway and the installation of a turn-around on the north drive.

When asked on cross-examination if he knew that there was a new well in the front yard with a three foot pipe, Mr. Whipple testified that he did not.

When asked by the Board how he would weigh the removal of 130 feet of the southern driveway, which was permitted by the February 13, 2008, HAWP,¹⁰ against the installation of 125 feet of new driveway across the front of the house, Mr. Whipple testified that the HPC is often more lenient with historic fabric that is to the rear of the Property or is not visible from the public right-of-way than it is with the Property's primary view or vista. He testified that this is why he believed the HPC had allowed the removal of a portion of the southern driveway.

7. Mr. Timothy Duffy, who is Vice President of a Washington, DC, architecture firm and a sitting HPC Commissioner, testified for the County. Mr. Duffy testified that the HPC uses Chapter 24A of the County Code and the Secretary's Standards when considering a HAWP application. He testified that the first issue the HPC had to deal with in this case was the impact of the driveway on the environmental setting. He testified that the large open space in front of this home was visible from the public right-of-way (Ashton Road). He testified that pursuant an individually-designated Master Plan site such as this one receives the highest degree of scrutiny. He testified that both the environmental setting and the structure(s) are considered important, and that unlike sites located in historic districts, the environmental setting of a Master Plan site takes on added importance because the site was individually designated.

¹⁰ See Exhibit 15.

Mr. Duffy testified that he had voted to deny the Appellant's HAWP, and that the HPC's decision to deny was unanimous (6-0). He testified that the view of this Property from the public right-of-way was important to him, and that he was confident it was important to all of the other Commissioners. He testified that there is a large open space in front of this Property.¹¹ He testified that there had never been a vehicular drive in front of the Property, but rather that the Property had been accessed from the rear and sides. He testified that considering the level of scrutiny given this historic resource, it seemed inappropriate to alter the open green space for vehicular traffic and parked vehicles.

Mr. Duffy testified that the HPC does consider hardship when evaluating HAWP applications. He testified that part of the discussion surrounding this HAWP was about alternatives for vehicular access to the house and for parking that would be consistent with the HPC's objective of maintaining the open space, and that the HPC had concluded that there were alternatives which were realizable and practical. Mr. Duffy testified that the HPC looked at this HAWP two times. He testified that the first time the HPC looked at this HAWP, it was poorly assembled and inadequate to allow for proper judgment. He testified that the HPC advised the applicant to seek a continuance of the hearing to avoid a denial at that first hearing, and that the hearing was continued. Mr. Duffy read an excerpt of his statements from the transcript of the September 26, 2007 (first) hearing, as follows:

And I can't approve a front driveway on this Master Plan site regardless. It significantly degrades the environmental setting, in my opinion, but certainly not without drawings consistent with those required for a HAWP.

See Exhibit 6(e), at circle 49, lines 14-17. Mr. Duffy testified that the HPC's concerns about the driveway were brought to the Appellant's concern, reading from Commissioner Fuller's statements, as set forth in that same transcript:

I believe you're hearing that in general the commission is not going to be supportive of the driveway.

See Exhibit 6(e), at circle 52, lines 11-22. Mr. Duffy testified that the Appellant did not comply with the request for better information, and that her request at the second hearing was much like her original HAWP application. Mr. Duffy read one of his statements, recorded on the transcript of November 14, 2007 (second) hearing, as follows:

I don't understand why, on a master plan site, with a retroactive HAWP, we can't get an adequate HAWP. I really don't think the drawings in the submission are adequate.

¹¹ In response to a question on cross-examination asking if the Property was in fact visible from Ashton Road/Route 108, Mr. Duffy testified that there were photographs of the Property in winter that were presented during the HPC hearings, and that the house was visible. He noted that when he talks about the Property being visible, he is primarily talking about the green space between the house and the road, which he testified was visible from Ashton Road. When asked if he could see the driveway, he answered that he would be speculating, but that surely the curb cut and some distance of the driveway would be visible.

See Exhibit 6(b), at circles 31, line 26, to circle 32, line 3. Mr. Duffy went on to read the comments of Commissioner Rotenstein regarding the driveway, with which he indicated that he and Commissioner Miles agreed:

Mr. Rotenstein: I'll stick with my comments made at the last hearing on this case. I think the circulation network on a site like this is something that we should consider equally with the above-ground built environment, and the changes to it are not sympathetic to the period nor to the design of the overall property. I would not be in a position to support what's already been done here, and I certainly would not have voted for this change had it been submitted to us as a standard HAWP.

Mr. Duffy: I agree with Commissioner Rotenstein.

Mr. Mile: As do I.

See Exhibit 6(b), at circle 34, lines 12-22.

In response to a Board question, Mr. Duffy testified that the Appellant had presented photographs of other properties with driveways across the front to the HPC, but that he did not believe any of them were Master Plan sites, and that he was not even sure that they were considered outstanding resources in historic districts. He further testified that the HPC had no information as to the standing of those properties as historic properties, and that because of this inadequate information, they thought it would not be fair to use them as comparative properties. He testified that if the properties had been Master Plan sites, then the HPC would need to talk about the history and design of each site, how it operated, its period of significance, and the view from the public right-of-way. By way of example, he testified that a more classical design, located closer to the road, may have had a driveway across the front. Thus he testified that the HPC would have had to look to see how the specifics of the properties depicted in those photos really compare to this historic Property.

Mr. Duffy testified in response to another Board question that there is not a formal relationship between the HPC and the MET, that the MET is another body that makes judgments about properties. He testified that the HPC should take the judgments of the MET into consideration, but that the HPC is charged with working under Chapter 24A of the County Code and under the *Secretary's Standards*, and that sometimes the HPC and MET disagree.

8. The Appellant testified on her own behalf. She testified that she purchased the Property in 2005, and that it had previously been owned by the Thomas family. She testified that there are two surviving (former) residents of the Property, and that one of them, Jean Ladson, who is 92 years old, has helped her with stories about the Property and its restoration. She testified that she was familiar with the family and was carrying out their wishes, mentioning Nikka Thomas, who died nine years ago.

The Appellant testified that she had been confused about the role of the MET. She testified that John Chapman of the MET had visited the Property in the spring of 2007, and had told her that if she was altering the Property, she had to get a HAWP application and send it to the MET, which she did. She testified that he told her the MET would get the application to the HPC. She testified that when she didn't hear anything about her application, she started the work. She testified that she contacted the MET and the HPC to tell them that work was starting. She testified that HPC staffer Joshua Silver and another woman came out to her Property.

The Appellant testified that when this house was built, Ashton Road was a quiet lane. She testified that it is very busy now. She testified that the Property has an asphalt driveway on the north side that goes around to the garage. She testified that both the asphalt and the garage were non-historic. She testified that there is a gravel driveway on the south side of the house, that it has grass growing in it, and that it is very insignificant. She testified that there is another dirt road on the south side of the Property that goes to the spring house, and that there is another dirt road that goes out behind the garage and up to Ashton Road on the north side. She testified that this is a treed property with lots of driveways and paths. She testified that Ms. Ladson had told her that the gravel driveway on the south side of the house was never a road, that her father would drive across the lawn on the south side of the house in order to put the carriage in the barn, and that his wife became irritated with his driving over the lawn, so he eventually put in a gravel drive.

The Appellant testified that because of the loud noise from Route 108 that the focus of the house has shifted from the west elevation to the south elevation. She testified that that is the beauty of the Property, that nobody sits on the front (west) porch, and that she was given permission [by the HPC] to take the wings off of the front porch. She testified that there is a well in the center of the front yard that she had to have installed when she could no longer get water from the spring house.

The Appellant testified that there are very large trees in the front yard, such that grass barely grows there. She indicated that the trees "aren't like pine trees where you can't see." See Transcript, page 100. She testified that you cannot see the new (front) driveway from Ashton Road/Route 108, and that you in fact can't see it until you get close to the house. She testified that the new driveway is not an eyesore, that it is constructed with gray gravel, and that it provides an entrance to the front of the house. The Appellant testified that the new driveway would only be used by guests and by her disabled son, who has spina bifida.¹² She testified that the front door is the quickest and most grand entrance to the house. She testified that there is another entrance on the northeast side of the house (to the kitchen), and one on the south side of the house (to the back hall), but that she didn't want guests entering through either of these doors, testifying that the front door was the easiest, best, and most logical point through which to access the house, and that it was the only way in which her disabled son could access the house.

¹² On cross-examination, she testified that if the HAWP were granted, she would permit elderly guests and her disabled son to park in front of the house.

The Appellant testified that she had looked at 13 different houses within a 5 mile radius of her Property, all of which were historic Master Plan sites and all of which had front driveways. She testified that all of these houses are unique, and all were built at different times. In response to questioning about these photos on cross-examination, the Appellant testified that her son had taken the photos within the past year, that she did not know whether the front driveways shown in the pictures had been installed before or after designation of the various properties as historic, and that she did not know if the front driveways themselves were historic. See Exhibit 7.

The Appellant testified that the HPC, in granting her February 13, 2008, HAWP, had given her permission to remove 130 feet of the driveway on the south side of the house to allow for expansion of the patio and to open up the southern vistas. She testified that the driveway she proposes at the front of the Property is five feet shorter than the driveway that was removed, and one foot narrower.

On cross-examination, the Appellant acknowledged that she had been given a continuance by the HPC to elaborate on her HAWP, but she testified that that was mostly concerned with the front porch, and that the HPC only wanted to know the width of the new driveway. She testified that she did not attend the November 14, 2007, hearing because she was not comfortable walking alone at night in Silver Spring. She testified that she has owned several historic properties, including Cherry Grove which she stated was designated on a Master Plan, and that she had done years of renovation work. She testified that her husband had handled the HAWPs for those properties.

On cross-examination, the Appellant testified that she began working on the grading for the driveway after submitting information to the MET on June 5, 2007. She admitted that she began work before submitting the HAWP to the HPC.

CONCLUSIONS OF LAW

1. Section 24A-7(h)(1) of the Montgomery County Code provides that:

“Within 30 days after the Commission makes a public decision on an application, an aggrieved party may appeal the Commission’s decision to the Board of Appeals, which must review the decision de novo. The Board of Appeals may affirm, modify, or reverse any order or decision of the Commission.”

2. Ordinarily, as this Board has previously held, when an appeal from a quasi-judicial body is heard “de novo,” the matter is to be tried anew as if it had not been heard before and as if no decision had been previously rendered. In effect, the Board is exercising what amounts to original jurisdiction. For all intents and purposes, it is the first hearing of the case. *Pollard's Towing, Inc. v. Berman's Body Frame & Mech., Inc.*, 137 Md. App. 277, 768 A.2d 131 (2001); *Boehm v. Anne Arundel County*, 54 Md. App. 497, 459 A.2d 590 (1985); *Lohrmann v. Arundel Corp.*, 65 Md. App. 309, 500 A.2d 344 (1985); *Hill v. Baltimore County*, 86 Md. App. 642, 587 A.2d 1155 (1991).

However, the Board is accorded some flexibility in pursuing a “de novo” inquiry. The Maryland courts have stated that the meaning of the term “de novo” with respect to administrative appeals may vary with the subject matter of the review, the function of the agency, or the nature of the remedy. *Boehm*, 459 A.2d at 598. “There are many provisions in Maryland law for what are loosely termed de novo ‘appeals.’ Some of these appeals are less ‘de novo’ than others in that the action of the body subject to review retains some vitality and must be considered in the reviewing process.” *Lorhmann*, 500 A.2d at 348.

In this case, the function of the Board is not, as it is elsewhere in the Code provided, to “hear” or “decide” the matter “de novo” (see, e.g., appeals from the Sign Review Board, Section 59-F-10.3). Under the Historic Preservation ordinance, rather, the Board’s function is to “review the [HPC] decision de novo.” We must assume that the County Council meant to use these particular words, and we must give them meaning. In order to review a decision, we must consider the decision. We think it is altogether appropriate, then, for the HPC to participate in the hearing and present its findings and reasons for making the decision that it did.

With respect to the burden of proof, Section 2A-8(d) of the County’s Administrative Procedure Act, which governs this proceeding, states unequivocally that “where a governmental agency or an administrative authority is a party, such agency or administrative authority shall have the burden of going forward with the production of evidence at the hearing before the hearing authority.” Section 2A-10(b) provides that “all recommendations and/or decisions of the hearing authority shall be based upon and supported by a preponderance of the evidence of record.” Consequently, where HPC is a party, it is required to produce evidence to show that its decision is correct. The Appellant may produce evidence to the contrary. The Board’s duty is to determine, by a preponderance of the evidence presented by all of the parties, whether the HAWP was correctly denied.

3. In reviewing an application for an historic area work permit, we look first to the criteria set out in Section 24A-8 of the Montgomery County Code:
 - “(a) The commission shall instruct the director to deny a permit if it finds, based on the evidence and information presented to or before the commission that the alteration for which the permit is sought would be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic site or historic resource within an historic district, and to the purposes of this chapter.
 - (b) The commission shall instruct the director to issue a permit, or issue a permit subject to such conditions as are found to be necessary to insure conformity with the purposes and requirements of this chapter, if it finds that:
 - (1) The proposal will not substantially alter the exterior features of an historic site or historic resource within an historic district; or

- (2) The proposal is compatible in character and nature with the historical, archeological, architectural or cultural features of the historic site or the historic district in which an historic resource is located and would not be detrimental thereto or to the achievement of the purposes of this chapter; or
 - (3) The proposal would enhance or aid in the protection, preservation and public or private utilization of the historic site or historic resource located within an historic district in a manner compatible with the historical, archeological, architectural or cultural value of the historic site or historic district in which an historic resource is located; or
 - (4) The proposal is necessary in order that unsafe conditions or health hazards be remedied; or
 - (5) The proposal is necessary in order that the owner of the subject property not be deprived of reasonable use of the property or suffer undue hardship; or
 - (6) In balancing the interests of the public in preserving the historic site or historic resource located within an historic district, with the interests of the public from the use and benefit of the alternative proposal, the general public welfare is better served by granting the permit.
- (c) It is not the intent of this chapter to limit new construction, alteration or repairs to any 1 period or architectural style.
- (d) In the case of an application for work on an historic resource located within an historic district, the commission shall be lenient in its judgment of plans for structures of little historical or design significance or for plans involving new construction, unless such plans would seriously impair the historic or architectural value of surrounding historic resources or would impair the character of the historic district.”

We must also consider the criteria for HAWP approvals set out on the HPC's regulations, as codified at Section 24A.01.01.1.5 of the Code of Montgomery County Regulations:

- “(a) The Commission shall be guided in their review of Historic Area Work Permit applications by:
- (1) The criteria in Section 24A-8.
 - (2) The Secretary of the Interior's Standards and Guidelines for Rehabilitation.
 - (3) Pertinent guidance in applicable master plans, sector plans, or functional master plans, including categorization of properties in historic districts by level of significance - if applicable. Such categories will be defined and explained clearly in the applicable plans.

- (4) Pertinent guidance in historic site or historic district-specific studies. This includes, but is not limited to, the 1992 Long Range Preservation Plans for Kensington, Clarksburg, Hyattstown, and Boyds.
- (b) Where guidance in an applicable master plan, sector plan, or functional master plan is inconsistent with the *Secretary of the Interior's Standards and Guidelines for Rehabilitation*, the master plan guidance shall take precedence."

In addition to being reviewed under Chapter 24A of the Montgomery County Code, alterations to historic resources that are individually designated on the Master Plan are reviewed under the *Secretary of the Interior's Standards and Guidelines for Rehabilitation*. Testimony and evidence of record indicate that the *Secretary's Standard* that is most pertinent to the analysis of this case is Standard 9, which states:

9. New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.

See Exhibits 6(a), 6(j), and 12.

In addressing the building site, the guidance set forth in the *Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings* for implementing Standard 9 (Alterations and Additions for the New Use), states that the following are recommended practices:

Designing new onsite parking, loading docks, or ramps when required by the new use so that they are as unobtrusive as possible and assure the preservation of the historic relationship between the building or buildings and the landscape.

Designing new exterior additions to historic buildings or adjacent new construction which is compatible with the historic character of the site and which preserves the historic relationship between the building or buildings and the landscape.

Those same *Illustrated Guidelines*, in implementing Standard 9 state, specifically state that the following actions are not recommended:

Locating any new construction on the building where important landscape features will be damaged or destroyed, for example removing a lawn and walkway and installing a parking lot.

Placing parking facilities directly adjacent to historic buildings where automobiles may cause damage to the buildings or to important landscape features.

Introducing new construction onto the building site which is visually incompatible in terms of size, scale, design, materials, color, and texture; which destroys historic relationships on the site; or which damages or destroys important landscape features.

See Exhibit 12 at page 74.

4. Section 24A-1 of the Montgomery County Code sets forth the purpose of the historic preservation chapter:

It is the purpose of this chapter to provide for the identification, designation and regulation, for purposes of protection, preservation and continued use and enhancement, of those sites, structures with their appurtenances and environmental settings, and districts of historical, archeological, architectural or cultural value in that portion of the county which is within the Maryland-Washington Regional District. Its further purpose is to preserve and enhance the quality of life in the county, safeguard the historical and cultural heritage of the county, strengthen the local economy, stabilize and improve property values in and around such historical areas, foster civic beauty and to preserve continued utilization and pleasure of the citizens of the county, the state, and the United States of America.

5. Section 24A-2 of the Montgomery County Code contains definitions. "Appurtenances and environmental setting" is defined as follows:

"The entire parcel, as of the date on which the historic resource is designated on the master plan, and structures thereon, on which is located an historic resource, unless reduced by the District Council or the commission, and to which it relates physically and/or visually. Appurtenances and environmental settings shall include, but not be limited to, walkways and driveways (whether paved or not), vegetation (including trees, gardens, lawns), rocks, pasture, cropland and waterways."

"Historic resource" is defined by that section as:

"A district, site, building, structure or object, including its appurtenances and environmental setting, which is significant in national, state or local history, architecture, archeology or culture."

6. The Approved and Adopted Sandy Spring/Ashton Master Plan identifies this Property as Master Plan Site #15/37, "Tanglewood," and specifically notes that the entire 21.74 acre parcel is included in the protected environmental setting, and that in the event of development, the refined setting should maintain, among other things, the existing driveway. See Exhibit 14.

7. From the foregoing, we glean the following guiding principles applicable to the Appellant's HAWP proposal:
- The purpose of the historic preservation chapter is to provide for the identification, designation and regulation, for purposes of protection, preservation and continued use and enhancement, of those sites, structures with their appurtenances and environmental settings, and districts of historical, archeological, architectural or cultural value in that portion of the county which is within the Maryland-Washington Regional District. Section 24A-1.
 - The "appurtenances and environmental setting" of this historic Property includes its driveway. Section 24A-2.
 - The HAWP must be denied if the alteration for which the permit is sought would be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic Property, and to the purposes of Chapter 24A. Section 24A-8(a).
 - The proposal must avoid the removal of distinctive or historic materials or the alteration of features, spaces, and spatial relationships that characterize this Property. Standard 9.
 - The environmental setting and existing driveway are significant features of this individually designated Master Plan Property. Exhibit 14.
8. Applying these guiding principles to the HAWP application before us, we find that the weight of evidence supports the HPC's denial of the proposed work.

The evidence before the Board establishes that the Property at 315 Ashton Road ("Tanglewood") was individually designated on the Master Plan for Historic Preservation in Montgomery County as Master Plan Site #15/37. The Property was noted, among other things, for its Gothic Revival architecture and its outstanding collection of outbuildings. See Exhibits 6(c) and (d). The Board finds that the Master Plan evidence presented by Mr. Whipple makes clear that that the environmental setting of this Property is significant to its designation ("The entire 21.74 acre parcel is included in the protected environmental setting."), and that in the event of development, the Property's "refined setting," which expressly includes its "existing driveway," was to be maintained. See Exhibit 14 (Sandy Spring/Ashton Master Plan). The Board was persuaded by the testimony of Mr. Whipple that the circulation pattern established on this Property by the existing driveway is significant to the history of the Property, and so finds.

Mr. Duffy testified that Master Plan properties receive the highest level of scrutiny. Mr. Whipple testified that the HPC applies a higher degree of scrutiny to proposals for changes that would be visible from the public right-of-way or that would alter the primary view or vista of an historic property than it does to changes proposed for the rear of a property or for other, less visible areas of a property. Neither of these statements were challenged by the by the Appellant, and both were accepted as correct by the Board.

There was considerable testimony regarding the extent to which this Property is visible from the public right-of-way along Ashton Road. Mr. Whipple characterized the front yard of this Property as relatively open and uninterrupted, and testified that the viewshed both in and out of the front of this historic home needed to be preserved. Mr. Duffy testified that the large open space in front of this house, and the house itself, are both visible from the public right of way (Ashton Road). Like Mr. Whipple, Mr. Duffy also testified about the need to preserve the view of this historic Property from the public right-of-way, stating that its preservation was important to him and, he felt certain, to all of the other Commissioners, in reaching their unanimous decision to deny this HAWP.

The Appellant testified that there are very large trees in the front yard of this Property, but stated that the trees were not pine trees that you couldn't see through, indicating that the front of the house was exposed to Ashton Road, at least in the winter. While the Appellant testified that the new (front) driveway could not be seen from Ashton Road, she also testified that if the HAWP were granted and the front driveway was allowed, her disabled son and any elderly guests visiting the Property would use that driveway to gain entrance to the house, and would park their cars on that driveway, in front of the house.

After carefully considering this testimony, the Board concludes that despite having large trees, the front yard of this Property is visible from the public right-of-way, per the testimony of Mr. Whipple and Mr. Duffy, and that irrespective of whether the driveway itself would be visible from the public right-of-way, cars parked in front of this historic home on that driveway would be visible from the road. Thus the Board finds that the introduction of a front driveway would disrupt the environmental setting of and view in and out of this Property. The Board further finds that the introduction of a front driveway would alter the historic circulation pattern on the Property which Mr. Whipple testified directed vehicles to the rear/service area of the Property, and would therefore change the way in which the public understands the historic use of this home. The Board finds that changes to the existing driveway are contrary to specific guidance in the Sandy Spring/Ashton Master Plan, which recommends that the existing driveway be maintained. The Board interprets this as an instruction to preserve not only the driveway, but also the historic circulation pattern.

In addition, the Board finds that the introduction of a new driveway across the front of this house would be contrary to *Secretary's Standard #9*, which states that new construction should not destroy the historic features and spatial relationships that characterize the Property. The *Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings* for implementing Standard 9 suggest that to comply with Standard 9, new onsite parking should be designed to be as unobtrusive as possible, and to assure the preservation of the historic relationship between the building or buildings and the landscape. These guidelines also suggest that removing lawn to install a parking lot, or placing parking facilities adjacent to an historic building where automobiles could cause damage to important landscape features, is contrary to Standard 9. In the instant case, the Appellant is seeking to remove a portion of the front lawn and install a driveway across the front of the house, which admittedly would be used for parking. The Board finds that this is not only not unobtrusive, but, by

altering the historic circulation pattern on the Property, the Board finds that this disrupts the historic relationship between the buildings and the landscape. Pursuant to Section 24A-8(a) of the County Code, the Board concludes that the requested driveway would be detrimental to the preservation and protection of this historic Property, and must be denied.

9. The Board was not persuaded by the testimony of the Appellant that because other historic houses in the area had front driveways, a front driveway should be permitted for this house. Even if one were to accept that the properties depicted in the photos presented by the Appellant were historic properties, an assertion which was disputed by Mr. Duffy, the Board finds valid the concerns articulated by Mr. Duffy at the hearing, namely that without background information about the designation of these properties, it would not be fair to compare them to the subject Property. To this end, Mr. Duffy testified that even if these properties were all Master Plan sites, the HPC would still need to consider the history and design of each site, how it operated, and the view into the property from the public right-of-way before it could determine if the site was comparable to 315 Ashton Road. The Board finds that without this evidence, these photographs are of little value. Even if the Appellant had presented detailed information about the historical designation and significance of these properties, the Board notes that the inquiry before it pertains to the subject Property, and that what was or has been done at neighboring properties is irrelevant to work at the subject Property unless the historical designation, context and value of those neighboring properties is shown to be the same as that of the subject Property.

Accordingly, this Board finds by a preponderance of the evidence that that the HPC's denial of that portion of HAWP No. 463823 which pertains to the installation of a 125 foot gravel driveway across the front of this historic house was correct and proper. The Appellants' appeal is therefore **DENIED**.

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Vice Chair Catherine Titus, seconded by Member Wendell M. Holloway, with Chair Allison I. Fultz, in agreement, and Member David K. Perdue necessarily not participating, the Board adopted the foregoing Resolution.

Catherine G. Titus
Vice-Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 15th day of January, 2009.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.